IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION NO. 243 OF 2007
With
CRIMINAL REVISION APPLICATION NO. 137 OF 2007
With
CRIMINAL REVISION APPLICATION NO.127 OF 2007
With
SPECIAL CRIMINAL APPLICATION NO. 839 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

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BHIKHAJI CHATURJI THAKORE & ORS. - Applicant(s)
Versus
STATE OF GUJARAT & ANR. - Opponent(s)

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Appearance :
Ms. S.M. Ahuja and Ms. Pragya Jha for Applicants in Criminal Revision Application Nos.243 of 2007 and 137 of 2007 and Special Criminal Application No.839 of 2006.
Shri Pravin Gondaliya for Applicant in Criminal Revision Application No.127 of 2007.
Shri L.R. Pujari, APP for Opponent No.1 in all matters.
Shri T.S. Nanavati with Shri Parimal Patel for Opponent No.2 in all matters.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 07/05/2007

COMMON ORAL JUDGMENT

The facts necessary for disposal of the three Criminal Revision Applications and Special Criminal Application No.839 of 2006 are that the original complainant, Chiragbhai son of Rambhai Patel reported to the Police Station, Sector-7, Gandhinagar in relation to the offences punishable under Sections 406, 409, 420, 465, 471, all read with Sections 34, 109, 114 and 120B of the Indian Penal Code, 1860 and such report, being C.R. No. I-147 of 2004, was registered at the police station. After registration of the criminal case, the police went into investigation and after collecting the material necessary for framing the charges, filed charge-sheet before the competent Magistrate. The Magistrate took cognisance in the matter and registered Criminal Case No.6867 of 2004. The accused persons were summoned and thereafter, they were taken into custody. The accused persons made various applications for their release on bail, but, the applications came to be dismissed on various dates on the ground that the accused persons had played a fraud, cheated the original complainant, deprived him of his valuable property and had pocketed money under the name and garb of execution of the sale deed.

2. It is to be noted that certain agricultural lands belonging to the accused persons and some other allottees were sold in favour of the intermediary purchasers, who in their turn agreed to sell the property to Chiragbhai Patel. It appears that after some time, because of some development, the said sale deeds executed by the accused in favour of the intermediary purchasers were revoked and thereafter, the applications were made for correction of the revenue records. The complainant, Chiragbhai Patel, in fact, had paid money to the

intermediary purchaser, namely, Shaileshbhai Joshi, who ultimately had to face number of problems. After the bail applications were rejected, the learned trial Court framed the charges and proceeded with the trial. The trial of the case started on 6th June, 2005 by examining Chiragbhai as Prosecution Witness No.1. It appears from the records that on number of occasions, number of witnesses were examined, but, within a period of sixty days, the trial could not be concluded, therefore, the accused persons made applications under Section 437(6) of the Code of Criminal Procedure, 1973 ("the Code" for short) with a submission that in view of the mandatory provisions contained in sub-section (6) of Section 437 of the Code, they be released on bail.

3. The learned trial Court, by its order dated 26th December, 2005, directed release of the applicants on bail. The applicants were, accordingly, released.

4. The order directing release of the applicants on bail was challenged before the learned Principal Sessions Judge, Gandhinagar in Criminal Revision Application No.10 of 2006. The said application came to be dismissed by the then learned Principal Sessions Judge, holding, *inter alia*, that the Criminal Revision Application was not maintainable, but, however the State or the original complainant were entitled to make an application under Section 439(2) of the Code. While disposing of the Criminal Revision Application as not maintainable, the learned Principal Sessions Judge made various observations on the merits of the matter. Even while dismissing the Criminal Revision Application, the learned Principal Sessions Judge also directed transfer of Criminal Case No.6867 of 2004 to some other Court. Taking a clue from the order dated 13th April, 2006 passed in Criminal Revision Application No. 10 of 2006, the complainant, in view of the liberty reserved in his favour, filed Criminal

Miscellaneous Application No.391 of 2006 in the Court of the learned Sessions Judge, Gandhinagar. It is to be noted that by that time, the learned Principal Sessions Judge, who had passed the earlier order, was transferred and a new incumbent had taken charge of the Office. The learned Sessions Court, in Criminal Miscellaneous Application No.391 of 2006, exercised the powers vested in him under Section 439(2) of the Code and quashed and set aside the order dated 26th October, 2005 passed by the learned 6th Additional Senior Civil Judge & Judicial Magistrate (First Class), Gandhinagar in Criminal Case No.6867 of 2004.

5. Gopalbhai Chaturbhai Amin, who also happens to be an accused, though was not a party in the first Criminal Revision Application No.10 of 2006, had challenged the order of transfer on the ground that such a judicial order could not be passed. The learned Principal Sessions Judge, while granting Criminal Miscellaneous Application No.391 of 2006, had observed that particular documents/applications were not properly marked and probably that had created confusion in the mind of the learned Judicial Magistrate (First Class). He also observed that the learned Court below erred in not appreciating that the complainant had made serious allegations against the accused persons and as there were no lapses/laches on the part of the prosecuting agency and as almost about 25 witnesses were examined within a period of six months, present was not a case for releasing all the accused persons on bail. The Court also observed that though it was of the opinion that while considering the application for cancellation of bail filed under Section 439(2) of the Code, the Court should be conscious while deciding the application that cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail. Even where *prima facie* case is established, the approach of the Court in the matter of bail should not be that the accused should be asked to

remain in jail for no good reason and the Court should enquire that if the accused is released on bail whether he would thwart with the course of justice or would be readily available to face the trial. The Court also observed that the Court proposing to cancel the bail must also see that whether liberty extended in favour of the accused had been misused by him or whether there is likelihood of any tampering with the evidence. After settling the principles of law, the Court referred to certain facts and then, proceeded to consider the judgements of different Courts. Ultimately, the Court observed that for grant or cancellation of bail, no hard and fast rule can be made, no hard and fast principles can be laid down and even the long detention in jail may not provide a solace to the accused. The Court observed that present was a case where only few witnesses were required to be examined, therefore, it was not proper to grant the bail to the accused specially when the investigation was over and the trial was likely to be concluded within a short while. The accused persons, who had suffered the cancellation order, have filed the above referred three Criminal Revision Applications. In accordance with the directions issued by the learned Principal Sessions Judge, the accused persons, who were released on 26th October, 2006, have now surrendered on 16th January, 2007 and since thereafter, they are in jail.

6. It is to be seen that some of the offences provide sentence for life, for seven years and for other terms. If the offences are triable by the Magistrate (First Class), then, the jurisdiction would be to award jail sentence to the extent of three years. True it is, that in a given case, the Magistrate may refer the matter either to the learned Chief Judicial Magistrate for awarding appropriate punishment or may refer the matter to the higher Court for awarding appropriate punishment. However, in the present case, the learned trial Court has not yet concluded the trial, the presumption would be that the learned Magistrate (First Class) is

competent to go on with the trial and decide the matter finally. Undisputedly, the accused persons were taken into custody on 21st September 2004; they remained in custody upto 26th October, 2005, that is, for a period of 12 - 13 months.

7. Undisputedly, the trial commenced on 6th June, 2005 and number of witnesses were examined by the prosecution. In accordance with the provisions contained under Section 437(6) of the Code, the applicant/accused, who is in jail for this period of sixty days, is entitled to make an application for release on bail and the Court in view of Section 437(6) of the Code is obliged to release him on bail unless for reasons recorded by the said Court, he is not required to be released on bail. After the release of the applicants on 26th October, 2005, they remained on bail upto 16th January, 2007. Undisputedly, there are no complaints against them and during the period 26th October, 2006 and 16th January, 2007, they did not absent themselves nor have tried to tamper with the evidence or tried to win over the witnesses. Even otherwise it is to be seen from the records that the entire matter hinges upon the agreement entered into the parties. The evidence would virtually be documentary evidence.

8. Ms. Sunita Ahuja and Shri Gondalia, learned Counsel for the applicants, submitted that the learned Court below erred in not appreciating that an application filed under Section 439(2) of the Code cannot be allowed just for the sake of asking. According to them, the prosecution and the complainant must bring on record certain facts, specially that after the release, the accused persons abused or misused the liberty extended in their favour, they tried to win over the witnesses or that they tried to thwart with the process. In the alternative, the prosecution could prove that the accused persons, after their release,

were absconding and were not available for trial or they were creating or causing unnecessarily hindrances in the legal trial in the matter and were delaying the process. It is also submitted that the foundation on which the bail earlier granted can be cancelled is something stronger than the grounds on which the bail is to be granted. It is submitted that the approach of the Court in granting the bail should be, "why not", while in case of cancellation, the Court should put the first question - "why".

9. It is also submitted that the learned Principal Sessions Judge erred in not appreciating that the nature of accusation, in a case where the offences are triable by the Magistrate (First Class), would not assume extra importance because the Magistrate would be entitled to award sentence of three years only. It is further submitted that during the period of 12 to 13 months, when the accused persons were enjoying the liberty, they did not do any wrong, which could lead to cancellation of bail. It is submitted that the order passed by the learned Sessions Judge be set aside and the order granting bail be restored and the accused persons be released on bail.

10. Shri Nanavati, learned Counsel, taking an exception to the argument, submitted that though the accused persons remained in jail for more than sixty days on the date of their release, but, the learned trial Court did not appreciate that there were no lapses on the part of the prosecution agency. Within a period of sixty days, almost 25 witnesses were examined and if only few witnesses remained to be examined, then, the present contention could not assume any importance for release of the accused persons on bail. Referring to the facts of the earlier order passed by the then learned Principal Sessions Judge, it is submitted that the observations made in the said judgement would conclude the issue. If such observations are appreciated by this Court, it

would clearly appear that the learned trial Court could not appreciate the facts in their true perspective and erred in granting the bail. It is also submitted that in a case where the mandatory word “shall” is used, the Court, in the given set of circumstances, can read it as “may”. His submission is that the Court if is granted discretion not to grant bail, then, the word “shall” loses its importance and would always be read as “may”.

11. Shri L.R. Pujari, learned Additional Public Prosecutor for the State, supports the arguments of Shri Nanavati and submit that three Criminal Revision Applications, so also the Special Criminal Application, deserve to be dismissed.

12. Ms. Ahuja, learned Counsel for the applicants in Criminal Revision Application Nos.243 of 2007 and 137 of 2007, submits that if the Court had no jurisdiction to entertain the Criminal Revision Applications, then it could not pass any order transferring the case.

13. Shri Nanavati, learned Counsel for the original complainant, however, submits that such an order could not be passed by the then learned Principal Sessions Judge, but, setting aside of that order would not make any difference because the learned Principal Sessions Judge, in his administrative capacity, has transferred the case on hands and as many as four thousand other cases. For perusal of the Court, he has produced a list of the cases, which were transferred from one Court to another Court.

14. Section 408(1) of the Code authorises the Sessions Judge to transfer the cases from one Court to another Court. The learned Counsel for the applicants submits that in view of Section 409, a Sessions Judge

would be entitled to withdraw or transfer the case from a Court if the trial is not commenced. According to her, as the trial is already commenced, the learned Sessions Judge could not withdraw the case from the Board of the learned Judicial Magistrate (First Class).

15. Section 408(2) provides that the Sessions Judge may act either on the report of the lower Court, or on the application of a party interested or on his own initiative. In the present matter, undisputedly, nobody had made any complaint to the learned Sessions Judge on the judicial side for transfer of the case. The lower Court did not make any reference for transfer of the case and while passing the judicial order, the learned Principal Sessions Judge did not pass any administrative order. The order passed by him certainly was an inappropriate order.

16. So far as sub-section (2) of Section 409 of the Code is concerned, the provisions would not apply to the facts of the present case. Sub-section (2) of Section 409 of the Code provides that at any time before the trial of the case or the hearing of the appeal is commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge. Sub-section 2 of Section 409 of the Code has nothing to do with withdrawal of the cases from the Court of the Magistrate. The general power of transfer vests in the learned Sessions Judge and Section 408 of the Code does not put any embargo on the power and authority of the learned Sessions Judge to transfer a case on the administrative ground.

17. Shri L.R. Pujari, however, submits that present case was not transferred under the administrative orders, therefore, the details given in this judgement may appear to be wrong. Shri Nanavati stands up and

now tells the Court that he wanted to submit to the Court that three other cases of the similar nature were transferred under the administrative order and even if this case was not transferred by that judicial order, ultimately the case could be transferred because it is an offshoot of the same transaction.

18. Undisputedly, nobody made any application before the learned Principal Sessions Judge for transferring of this case to any other Court. In any Criminal Revision Application, where the grant of bail was challenged, the learned Sessions Judge, in the considered opinion of this Court, could not pass an order of transfer. The submission of Shri Nanavati, however, is that three other cases, which also arise out of the same transaction, have been transferred on the administrative side and even if the learned Principal Sessions Judge had not passed the judicial order of transfer of the case, then, this case being the fourth in the group could be transferred along with other three matters.

19. In the opinion of this Court if the learned Principal Sessions Judge had no jurisdiction to pass an order, then, he could not direct transfer of the cases. The order directing transfer of the case is hereby quashed. The matter would go before the same learned Magistrate. It would, however, be open for the parties to make an application under Section 408 of the Code to the Sessions Court for transfer of this case to any other court. Accordingly, Special Criminal Application No.839 of 2006 is allowed. Rule is made absolute to the extent indicated above.

20. Coming to the question of grant or cancellation of bail, the provisions of Sections 437(6) and 439(2) are to be considered and Section 437(5) of the Code is also required to be appreciated.

21. Section 437 provides that when any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court other than the High Court or Court of Sessions, he may be released on bail subject to certain conditions. Sub-section 5 of Section 437 provides that any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. Grant under sub-section (1) or sub-section (2) of Section 437 can be cancelled under Section 437(5).

22. Section 439 of the Code proceeds to read as under :

> "***439. Special powers of High Court or Court of Session regarding bail.--*** *(1) A High Court or Court of Session may direct --*
>
> *(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section.*
>
> *(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified.*
>
> *Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing,*

of opinion that it is not practicable to give such notice."

Sub-section 2, material for disposal of the present matters, reads that a High Court or Court of Session may direct that any person who has been released on bail, under the said chapter, be arrested and commit him to custody. The powers under Section 439(2) conferred upon the Court of Sessions or the High Court are akin to the powers conferred upon the Magistrate under sub-section (5) of Section 437.

23. Section 437(6) provides that if, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded, within a period of sixty days from the first date fixed for taking the evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. Sub-section (6) clearly uses the mandatory word "shall" because the scheme of the Act is that if you cannot conclude the trial at least within sixty days from the date of starting of the recording of the evidence, then, such an apathy shown by the Court or by the prosecution would pave the path of the accused to walk out of the jail. The mandate under the law is to release the accused on bail. The rejection is an exception and for such rejection, the Court is required to record the reasons in writing. The word "shall" is to be read as "shall" and not as "may". If it is read as "may", then, there would be reason to give reasons for rejection. When the liberty of a person is involved the mandate of law cannot be diluted by reading the word "shall" as "may".

24. A comparison of Section 437 and Section 439 on one hand and Section 438 on the other would also show that in an application

under Section 437/439, the Court must ask the prosecutor, why the bail should not be granted and if the prosecutor satisfies the Court that case on hands is fit for rejection of the bail application, only then, the Court would reject the application. While in an application under Section 438, the Court should ask the Counsel for the defence that why such an application should be granted. If the defence proves to the satisfaction of the Court that they are entitled to grant of anticipatory bail, then, such anticipatory bail may be granted. The question for consideration would be what should be the approach under Section 437(6), jail or bail. In the present matter, the bail granted in favour of the accused persons was challenged on the ground of explainable delay in the matter, i.e. the trial was likely to be concluded in a short while and the learned Magistrate got confused in considering the applications.

25. In the matter of ***Aslam Babalal Desai vs. State of Maharashtra***, [***AIR 1993 SC 1***], the Court, while considering the provisions under Section 167(2), 437(1), or 437(2) or 439(1), observed that consideration for grant would be altogether different while consideration for cancellation available under Section 437(5) or 439(2) would be different. The Court observed that the bail can be cancelled on considerations which are valid for cancellation of bail granted under Section 437(1) or (2) or Section 439(1) of the Code. The Court also observed that the earlier rejection of bail or that bail was secured by the thrust of proviso (a) to Section 167(2) then recedes in the background. The Court also observed that the grounds for cancellation of bail under Sections 437(5) and 439(2) being identical, bail can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there

is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. The Court further observed that the points/grounds carved out by the Apex Court are illustrative and not exhaustive. The Court lastly observed that it must always be remembered that rejection of bail stands on one footing, but, cancellation of bail is a harsh order because it interferes with the liberty of the individual and it must not be lightly resorted to.

26. In addition to the grounds provided by the Apex Court, the bail can also be cancelled on the ground that the order granting bail is casual in approach, capricious and arbitrary in nature and cavalier in the reasoning, it sans reasons, it is perverse, it ignores the evidence which is available on the record or the Court failed to apply appropriate law while granting the bail.

27. In the present matter, it is nobody's case that the order passed by the learned Magistrate is casual or cavalier or it is capricious, whimsical or arbitrary or sans reasons, it is perverse or it ignores the evidence, which is available on the records. In fact, the bail has not been granted on the merits of the matter, the bail has been granted in view of the default clause contained in Section 437(6). Section 167(2) on one side provides an indefeasible right to the accused because if the charge-sheet is not filed within a period of sixty/ninety days, then, the indefeasible right would accrue in favour of the accused and the Magistrate would be obliged to release the accused on bail. However, Section 437(6) of the Code while on one side provides an absolute right in favour of the applicant to secure bail under Section 437(6), but, at the same time, puts a check on the said right by conferring jurisdiction upon

the Magistrate to reject the applications for the reasons to be recorded in writing.

28. If the Magistrate, while exercising his discretion, does not find any reason for rejection of the application, the Revisional Court or a higher court would not be entitled to say that the order passed by the Magistrate is bad or wrong. In the present case, the correctness, validity and propriety of the order granting bail is not being challenged, but, the original complainant challenges the release of the accused persons on bail with a submission that the bail granted in favour of the accused be cancelled. I have already observed that the bail was granted by the learned Magistrate exercising his discretion and in a matter where a subordinate court exercises its discretion unless it is shown to the higher court that there was an element of perversity in exercise of the discretion, the higher court would not be entitled to interfere with the discretion exercised by the said subordinate court.

29. It is also to be seen that some of the women accused, who are facing similar charges have already been released on bail. True it is, that such women are entitled to be protected under the law, but, that in itself would be one ground to release the accused persons on bail if they remained in jail at least for 12 to 13 months.

30. In the matter of ***Ram Govind Upadhyay vs. Sudarshan Singh & Ors.,*** [***(2002) 3 SCC 598***], the Apex Court observed that grant of bail though is a discretionary order, but, however, calls for exercise of such discretion in a judicious manner and not as a matter of course. The order for bail bereft of any cogent reason cannot be sustained. While placement of the accused in the society, though may be considered, but, that by itself cannot be a guiding factor in the matter of grant of bail and

the same ought always to be coupled with other circumstances warranting the grant of bail. The Apex Court also observed that considerations applicable to the grant of bail and considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non-consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on records, it is a duty incumbent on the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The Court also observed that grant and cancellation stands on different footing.

31. In the matter of ***Mahant Chand Nath Yogi vs. State of Haryana***, [***AIR 2003 SC 18***], anticipatory bail was granted in favour of the accused, the offence was under Section 302, read with Section 120B, of the IPC for conspiracy of the murder. The anticipatory bail earlier granted came to be challenged before the High Court. The Apex Court found that the earlier grant of bail was not misused by the accused and after the charge-sheet was filed, there was no reason to cancel the anticipatory bail. The Court also observed that even if the earlier investigation made by the police was faulty and *mala fide*, it would not be taken to be a ground against the accused. The principle laid down is that if judicial discretion was exercised in granting anticipatory bail and the order was not perilously bordering perversity, then, such an order could not be cancelled.

32. In the present matter, undisputedly, the accused persons remained in custody for almost about 12 to 13 months, the trial commenced on 6th June, 2005, the trial could not be concluded within sixty days and till date the trial is still pending consideration and the

accused persons, who were directed to be released on bail. On 26th October, 2005, continued on bail upto 16th January, 2007 and in the meanwhile, they did not misuse the liberty extended in their favour, nor there is any allegations from the side of the complainant or the prosecution that the liberty was misused or abused, then, there would be no good reason to cancel the bail. Examining the order on the touchstone of the principles laid down by the Apex Court in its various judgements, I am unable to hold that the Court below was justified in cancelling the bail. The accused had remained in jail for almost about 14 to 15 months and if in a case triable by the Magistrate (First Class), the accused is required to remain in jail for 15 months and the trial is not concluded, then, it would be a slur on the judicial system that the Magistrates are unable to conclude the trials on one side and the prosecution, so also the original complainant on the other, are deriving sadistic pleasure out of long detention of the accused in jail. The order passed by the learned Principal Sessions Judge directing cancellation of bail is hereby quashed.

33. The order dated 26th October, 2005 passed by the learned 6th Additional Civil Judge & Judicial Magistrate (First Class), Gandhinagar in Criminal Case No.6867 of 2005 is hereby restored. If the bail bonds/personal bonds earlier submitted by the accused persons have not been cancelled by the learned Magistrate, then, on the same bonds, the accused would be released on bail, but, in case the said bonds have already been cancelled, then, on the terms, as provided in the order dated 26th October, 2005, each of the applicants shall be released on bail by him. All the three applications are hereby allowed. Direct Service is permitted.

[R.S.Garg, J.]

*kamlesh**